IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 104 OF 2005

WITH

COMPANY PETITION NO. 105 OF 2005

WITH

COMPANY PETITION NO. 106 OF 2005

COMPANY PETITION NO. 104 OF 2005

WITH

COMPANY APPLICATION NO. 446 OF 2004

National Organic Chemical
Industries Ltd., .. Petitioners.

And

Nocil Employees Union. .. Applicant.

Shri I.M. Chagla with D.D. Madon for petitioners.

Shri C.J. Joy with R.C. Master & M.M. Goswami
Panel Counsels i/by Dr. T.C. Kaushik
for Regional Director Dept. of Company
Affairs, Maharashtra, Mumbai.

Ms. Gayatri Singh for Notice Employees Union.

Shri P.M. Patel for Ms. B.B. Dholakia for
Rashtriya PIL Kamgar Sangh
Intervenor.

COMPANY PETITION NO. 105 OF 2005

WITH

COMPANY APPLICATION NO. 447 OF 2004

Relene Petrochemicals
Pvt. Ltd., .. Petitioners.

And

Nocil Employees Union. .. Applicant.

Shri I.M. Chagla with D.D. Madon for petitioners.
Shri C.J. Joy with R.C. Master & M.M. Goswami
Panel Counsels i/by Dr. T.C. Kaushik
for Regional Director Dept. of Company
Affairs, Maharashtra, Mumbai.
Ms. Gayatri Singh for Notice Employees Union.
Shri P.M. Patel for Ms. B.B. Dholakia for
Rashtriya PIL Kamgar Sangh
Intervenor.

COMPANY PETITION NO. 106 OF 2005

WITH

COMPANY APPLICATION NO. 448 OF 2004

Nocil Petrochemicals
Ltd., .. Petitioners.

And

Nocil Employees Union. .. Applicant.

Shri I.M. Chagla with D.D. Madon for petitioners.

Shri C.J. Joy with R.C. Master & M.M. Goswami
Panel Counsels i/by Dr. T.C. Kaushik
for Regional Director Dept. of Company
Affairs, Maharashtra, Mumbai.

Ms. Gayatri Singh for Notice Employees Union.

Shri P.M. Patel for Ms. B.B. Dholakia for
Rashtriya PIL Kamgar Sangh
Intervenor.

..

CORAM : S.U. KAMDAR, J.

DATE : 8th JUNE, 2005.

ORAL JUDGMENT :

1. These three company petitions are filed under sections 391 to 394 of the Companies Act, 1956. By these petitions the National Organic Chemical Industries Limited (hereinafter referred to as Nocil) has put forward a scheme for restructuring the business of the said company by demerger of the specified areas and liability of the petrochemicals and Polymer Division and vesting the same in Relene Petrochemicals Private Limited and demerger of plastic products Division of Nocil and vesting in Nocil Petrochemicals Limited. It

has also put forward a scheme for compromise with creditors and shareholders of Nocil with effect from 30.9.2003.

2. The original company known as Nocil was incorporated with the object to run the business of manufacturing in chemicals and chemical components and chemical products of various kinds and other allied objects. The company had its authorised share capital of Rs. 12,00,00,00,000/- divided into 1,20,00,00,000/- equity shares of Rs. 10/- each. The aforesaid scheme has been devised by the company because according to the company, the division of petro chemicals and Polymer Division and Plastic Division of the company has become unviable and uneconomical due to various extraneous factors such as the policy of the Government of India of liberalisation and globalisaton which has opened up the petrochemicals sector to worldwide giants like Shell Chemicals International, Petronas, L.G. Petrochemicals and others. The second reason given is reduction in import tariffs / customs duties on import of the said goods which has resulted in substantial erosion in sales realisation of the finished products manufactured by the petitioner herein. It has also been contended that the business of the company has substantially suffered because of substantial increase in the price of naphtha, obsolete

technology and sub-optimal capacity of the manufacturing operations leading to the cost of production being more than the selling prices of the end products of the petitioner company. In view of the aforesaid factors, the aforesaid divisions of the company have not been doing well and thus the company is contemplating to hive off the aforesaid divisions to the different separate legal entities and incorporated companies. The Board of Directors of the Company has taken a decision in its meeting dated 21.5.2002 to close down the aforesaid divisions and it has also been considered that whether the employees should be retrenched. It seems that in respect of the employees a scheme has been worked out for retrenching them from the petitioner company. The scheme therefore envisages the demerger of the said Polymers Division and Plastic Products Division.

3. The necessary majority of the creditors have given their consent to the said scheme as well as the shareholders of the company have also given consent. After the presentation of the present petition before this Court, the Regional Director was required to go through the said scheme and file his objections. Pursuant thereto, the Regional Director has filed an affidavit dated 13.4.2005 in which it has been inter alia pointed out that the company has already made a mandatory reference to

the BIFR under the provisions of Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 on 28.2.2004 and the said reference is registered under C.A 105 of 2004. The said reference is still pending. It has been therefore contended that in view of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA') this Court ought not to exercise jurisdiction under section 391 to 394 of the Companies Act, 1956. The intervention application was also made being Company Application No. 176 of 2005. However, by and between the intervenors and the company an understanding has been arrived at and pursuant thereto the company has filed a draft amendment amending the scheme by amending clause H-1 thereto. The said draft amendment is granted. In view of the said amendment being made, the Nocil Employees Union who were intervenors do not have any objection to the present scheme of demerger.

4. The only issue which arises in the present case for my determination is that whether in view of the provisions of Section 32 of SICA once the reference having been registered under section 15 whether this Court is entitled to exercise power under sections 391 to 394 of the Act or by virtue of the overriding effect under section 32 the provisions of section 15 to 18 which also provide

for preparation and finalisation of the scheme of the sick industrial companies would override the provisions of section 391 to 394 of the Companies Act.

5. Mr. Chagla, the learned counsel for the petitioner has contended that it is immaterial that the reference is registered under section 15 of SICA and the Court has ample jurisdiction and power to sanction the scheme under section 391 to 394 of the Companies Act, 1956. It has been further contended by the learned counsel Mr. Chagla that the provisions of section 22 of SICA which inter alia provide for suspension of the provisions has no application in the present case because the present case is not a suit and, therefore, this Court can proceed under section 391 to 394 and sanction the scheme. It has also been contended that even the provisions of section 26 of the SICA would also not apply because the bar of the jurisdiction of the Civil Court is given in a very limited manner and only to the cases where the orders are passed by the BIFR and appeal lies therefrom to the appellate authorities under the said statute. The said bar of jurisdiction applies only in case of appeal and does not apply to the present proceedings under section 391 to 394 of the Companies Act. It has also been further contended by the learned counsel that section 32 of the Act

which has been given an overriding effect applies only to the situation where the provisions of the two statutes are inconsistent with each other and overriding effect is only given to those provisions which are inconsistent with the provisions of SICA. It has been thus contended that the provisions of SICA under sections 15 to 19 as well as the provisions of section 391 to 394 being not inconsistent with each other the said overriding effect of section 32 will not be applicable and this Court shall have jurisdiction to entertain and try the present petition and decide the same accordingly.

6. In support of the aforesaid contention that the provisions of section 22 of SICA have no application to the facts of the present case, the learned counsel has relied upon an unreported judgment of the Division Bench of the High Court of Himachal Pradesh, Simla in the case of In re Gontermann-Piepers (India) Ltd decided on 12.7.2004 reversing the judgment of the learned Single Judge which has taken the view that by virtue of the provisions of section 22 the proceedings under section 391 to 394 would stand suspended in view of the provisions of section 22 of SICA. The Division Bench has reversed the view taken by the learned Single Judge in the case of In re Gontermann-Piepers (India) Ltd., reported in [2005]

57 SCL 225 (HP). In so far as the aforesaid argument is concerned, I find that on a plain and simple reading of section 22 of the Act it is clear that the suspension of legal proceedings is only in respect of winding up of the industrial company or for execution or attachment of any of the properties of the industrial company for for appointment of the receiver. In so far as the guarantors are concerned, the limited protection is granted that is no suit for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loan granted to the industrial company shall lie. In my view on a plain and simple reading of section 22 the law did not contemplate the suspension of any proceedings under section 391 to 394 of the Companies Act, 1956. In view thereof, there is no question of the proceedings being suspended by virtue of section 22 of the Act. Similarly, the provisions of section 26 of the Act also have no application in the present case because the provisions of section 26 apply only when order is passed or proposal is made under the said Act which becomes appealable then except as provided in the said Act no Civil Court shall have jurisdiction in respect of those matters which are to be decided by appellate authority or the Board which is empowered under the Act to determine the said issues and no injunction can be granted by any

Court in respect of any action taken under the provisions of the said statute. In view thereof, the provisions of section 26 also have equally no application.

7. The learned counsel Mr. Chagla appearing for the petitioner has also relied upon the judgment of the Karnataka High Court in the case of In re Kirloskar Electric Co. Ltd., reported in [2003] 43 SCL 186 (Kar.) as well as the judgment of the Madras High Court in the case of Ponni Sugars & Chemicals Ltd., & Anr. in C.P. Nos. 118 & 119 of 2000 decided on 10-9-2001. The Karnataka High Court has while considering the scheme of amalgamation under section 391 to 394 in paragraph 28 has held as under :-

> "28. The order passed by the BIFR in case No. 320/2002 of M/s. Kirloskar Electric Company Limited is also placed on record. It discloses that M/s. Kirloskar Electric Company Limited has been declared as a sick industrial company in terms of section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985. They have further observed that the Company could make the net worth exceed the accumulated losses within a reasonable period on their own as per the rehabilitation package to be

> formulated and submitted by them under section 17 (2) of the Act. Further a direction was issued to the Company to discuss the rehabilitation package with all secured creditors and other concerned parties and reach an agreement on the reliefs and concessions envisaged from them. A direction was issued to the company not to dispose of any fixed asset or current assets of the company without the consent of the secured creditors and the BIFR and they have issued other directions in this regard. That is how the petitioner-company has formulated the scheme and has obtained the approval of the shareholders and the secured creditors."

My attention has been drawn to paragraph 28 of the said judgment. From a reading of paragraph 28, I find that the said paragraph only records the filing of the proceedings before the BIFR but in the whole judgment there is no discussion of any issue being considered or decided in any manner whatsoever. Similarly, my attention was also drawn to paragraph 35 of the said judgment of the learned Single Judge of the Madras High Court wherein also issue was raised that whether a Company Court will exercise jurisdiction under section 391 to 394 of the Companies Act in view of the pending reference

before the BIFR. It was held that though the company is before the BIFR no interim order was passed and it was further held that there are no provisions under SICA precluding this Court from granting approval under section 391 of the Companies Act. However, the moot question which requires to be considered in the present case is the effect of section 32 of SICA. The provisions of section 32 is an overriding provisions. The said section 32 reads as under :-

> "32. Effect of the Act on other laws.--(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act,
>
> (2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company,

> the provisions of Section 72-A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation, by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company."

If the provisions of section 391 to 394 of the Companies Act are inconsistent with the provisions of sections 15 to 19 of SICA then in that event by virtue of section 32 of the SICA the said provisions will have an overriding effect and shall prevail notwithstanding anything inconsistent under the provisions of section 391 to 394 of the Companies act. In my opinion the answer to this question lies in the fact whether there is any inconsistency between the said provisions of section 32 and the provisions of section 391 and 394 of the Act which are the relevant provisions of the Act. The provisions of section 391 and 394 are as under :-

> "391.(1) Where a compromise or arrangement

is proposed --

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the [Tribunal] may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the [Tribunal] directs.

(2) If a majority in number representing three-fourts in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed [under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the [Tribunal], be binding on all the creditors, all the creditors of the

class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of a company which is being wound up on the liquidator and contributories of the company;

[Provided that no order sanctioning any compromise or arrangement shall be made by the [Tribunal] unless the [Tribunal] is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the [Tribunal], by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251 and the like.]

(3) An order made by the [Tribunal] under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy

of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [one hundred] rupees for each copy in respect of which default is made.

(6) The [Tribunal] may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the [Tribunal] thinks fit, until the application is finally disposed of."

"394. (1) Where an application is made to the [Tribunal] under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the [Tribunal]-

(a) that the compromise or arrangement has

been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company");

the Tribunal] may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be

allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the [Tribunal] directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out;

[Provided that no compromise or arrangement proposed for the purpose of or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the [Tribunal] unless the [Tribunal] has

received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest;

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the [Tribunal] unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the [Tribunal] that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.]

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within (thirty) days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [five hundred] rupees.

(4) In this section --

(a) "property" includes property, rights and powers of every description; and "liabilities" includes duties of every description; and

(b) "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

8. Mr. Chagla, the learned counsel for the petitioner has contended that there is no inconsistency between the aforesaid two provisions. He has drawn my attention to the statement and objects and reasons of SICA to indicate that the whole idea to introduce the provisions of SICA is to make the company financially viable and independent. He has contended that the provisions providing for merger and demerger of the companies under sections 391 and 394 of the Companies Act also similarly has the same object of making the company viable and more efficient. Thus, he has contended that the provisions of both the statutes are supplemental to each other and not inconsistent therewith and, therefore, this Court would have power to sanction the scheme under section 391 and 394 of the Companies Act irrespective of the provisions of section 32 of SICA. I have considered the aforesaid contention and I find considerable substance and merit therein. The provisions of section 15 to 19 of the Act is a scheme where a company which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the company and/or make the company viable so that the business of the company can continue. The

provisions of section 391 to 394 of the Companies Act, 1956 also similarly provide for rearrangement of the company's business by way of granting amalgamation, demerger and/or by sanctioning of the scheme of compromise which also has very same purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each others. Apart therefrom, I find that the provisions of SICA operate in a slightly different sphere i.e. the case where the net worth of the company has become negative. Whereas the provisions of section 391 to 394 have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing quite well and are seeking to rearrange its business for the efficient management or better business prospects and thus seeks to amalgamate or demerge its business operation of the company. In my view, since there is no inconsistency between the provisions of section 32 of the SICA and the provisions of section 391 and 394 of the Companies Act, there is no question of the provisions of section 32 of the SICA being made applicable to the present case. In my view, therefore the Court has power and jurisdiction to grant sanction of the scheme under section 391 and 394 of the Companies Act, 1956. In view thereof, I

make the present petition absolute in terms of prayer clauses (a) to (d).

9. The petitioners in each of the petitions to pay cost of Rs. 2500/- each to the Regional Director.